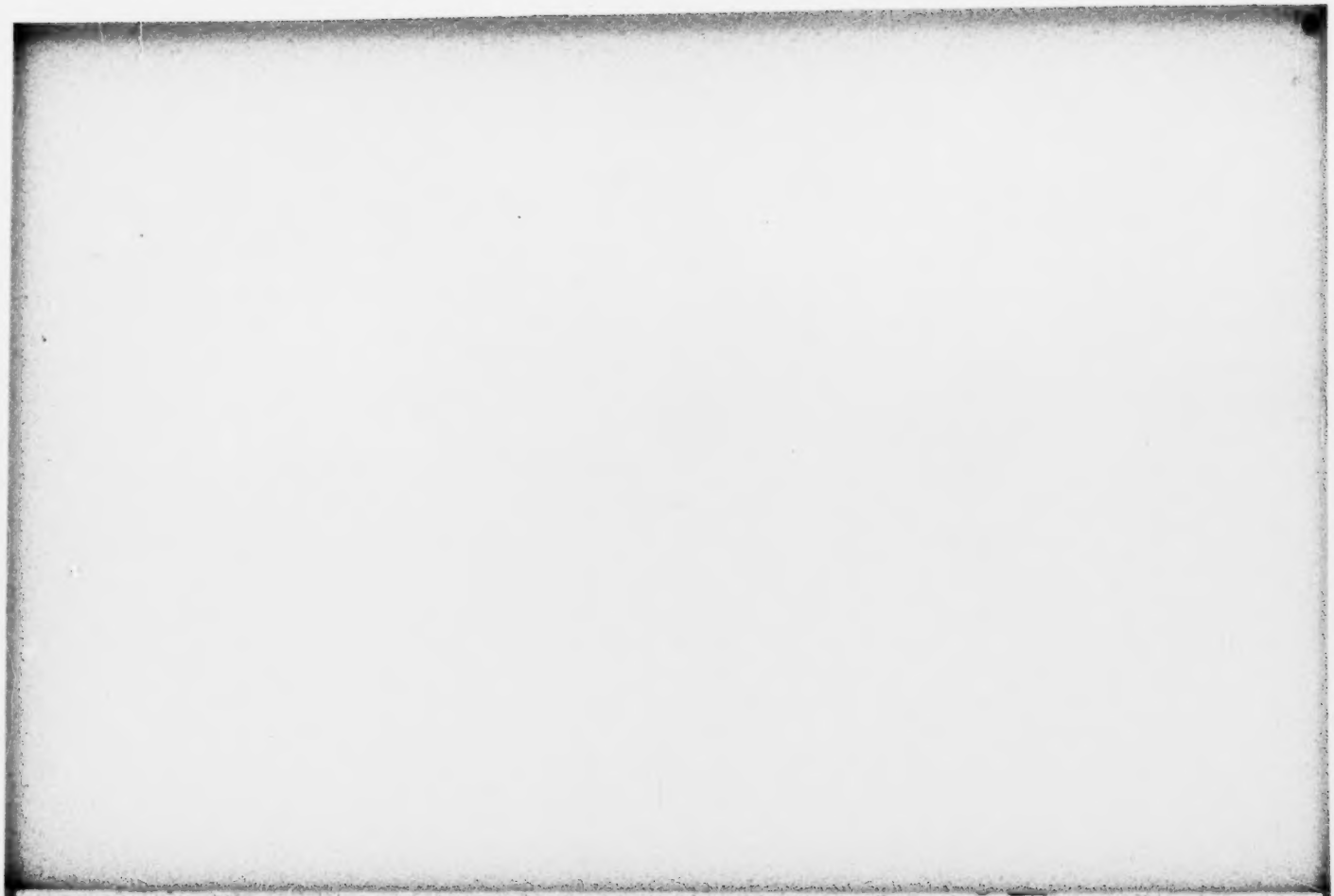

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1974
No. 74-1147

Beatrice Harwell, Individually and
Beatrice Harwell as Aministratrix of the
Estate of Roy R. Harwell, Deceased ..... *Petitioner*

V.

Westchester Fire Insurance Company, a
Division of Crum & Forster Insurance
Companies ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR WESTCHESTER FIRE INSURANCE COMPANY, A DIVISION OF CRUM & FORSTER INSURANCE COMPANIES IN OPPOSITION

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OPINIONS BELOW

The Memorandum Opinions delivered in the United States Court of Appeals for the Eighth Circuit are unreported and are printed in Appendix "B" and Appendix "C" of Petitioner's Petition For Writ of Certiorari (Pet.

App. 11-17). The opinion of the United States District Court, Eastern District of Arkansas, is printed in the record certified from the United States Court of Appeals for the Eighth Circuit at page 30 of Appendix to Petitioner's brief (Pet. 1-2).[1]

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 9, 1974. Timely petition for rehearing en banc was denied on January 20, 1975. The petition for Writ of Certiorari was filed on March 11, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of the State of Arkansas and the defendant being a foreign corporation doing business in the State of Arkansas.

QUESTION PRESENTED

Whether the United States Court of Appeals for the 8th Circuit properly held that there was no substantial evidence to support a jury's finding of negligence on the part of the operator of the vehicle.

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1 The Opinion of the United States District Court, Eastern District of Arkansas is omitted from petitioner's appendix. The opinion is set forth at A. 30. ("A" refers to the appendix to the briefs filed in the Court of Appeals.)

STATUTE INVOLVED

The statutory provisions involved are; Ark. Stats. Ann. §66-3238, Suits against insurers — Damages and attorney fees on loss claims and U.S. Code Ann. Title 28, Federal Rules of Civil Procedure, Rule 50 (Pet. App. "A", 9-10).

STATEMENT

A diversity suit was filed by petitioner, Beatrice Harwell, against her carrier, respondent, Westchester, in the United States District Court in Little Rock, Arkansas on April 27, 1973. The complaint alleged that on December 16, 1972 petitioner's husband, Roy R. Harwell, while crossing the EASTEX Freeway in Houston, Texas, was struck and killed by an automobile being driven by Dorothy Lyssyj an uninsured motorist. The complaint further alleged that petitioner and her husband had in force, on December 16, 1972, a policy of insurance with respondent, providing uninsured motorist coverage. The pertinent part providing "to pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured, caused by the accident and arising out of the ownership, maintenance or use of such uninsured motor vehicle." The complaint went on to allege that the uninsured motorist, Dorothy Lyssyj, was negligent and her negligence was the proximate cause of the accident and prayed for damages.

The facts disclosed by the evidence in the case are relatively scant. No eye witness was called to testify at the trial. On December 16, 1972 the plaintiff's decedent, Roy

R. Harwell, departed Little Rock at approximately 5:00 a.m. to visit his sons living in Houston, Texas. (A. 77, 80). That Saturday night, Officer Faultry, an accident investigator for the Houston, Texas Police Department, received a call to investigate an automobile accident occurring approximately fifteen miles north of Houston, on U.S. Highway 59 and involving Mrs. Dorothy Lyssyj and a pedestrian, Roy R. Harwell. (Joint Ex. No. 2, A 41, 83) Officer Faultry estimated the accident occurred at approximately 9:00 p.m., or between one to one and a half hours prior to his arrival. (A 48, 54) He observed the body of plaintiff's decedent, Mr. Harwell, who had been killed by an impact with the automobile driven by Mrs. Lyssyj, and who had been moved off of the highway by a state patrol unit prior to his arrival. (A 49, 56) Premised upon the location of one of the plaintiff's decedent's shoes and scuff marks on the highway, Officer Faultry determined the point of impact as being approximately three feet into the right lane of traffic. (A 48, 58) The traveled portion of the highway at the point of impact is twenty-six feet wide, each lane being thirteen feet wide, with an emergency shoulder ten feet wide on the right side. (A 50) The speed limit at night is 65 miles per hour. (A 62) Officer Faultry located Mrs. Lyssyj's automobile, which was parked approximately six hundred yards north of the point of impact. (A 49) He examined her vehicle and found the headlights and brakes to be in proper working condition. (A 55) Further examination revealed that the right front parking light was knocked out and that the headlights were still intact. (A 56-57) He stated the highway at the time of his arrival was level and dry and the weather was freezing with clear visibility. (A 51) Furthermore, he described the traffic at the time of his arrival as being light. (A 53) Business establishments are located opposite the point of impact on either side of the highway. (A 51-52)

There is, however, no lighting on either the freeway or the access roads to the freeway in the proximity of the point of impact. (A 58) The highway is dark at this point and Officer Faultry utilized a flashlight in his investigation. (A 58) The highway is constructed of black asphalt, commonly referred to as blacktop. (A 51, 58) The plaintiff's decedent was wearing a brown, three-quarter length coat, a gray sweater, blue shirt, dark blue slacks and black shoes. (A 59) Sometime after the completion of his accident report, Officer Faultry received a call stating that a vehicle had been found in the proximity of the accident, and upon checking its registration number, he determined that the automobile belonged to the plaintiff's decedent, Roy R. Harwell. (A 62) The toxology report from the Chief Medical Examiner of Harris County on the body of plaintiff's decedent evinced that the cerebral spinal fluid contained 0.107% alcohol. (A 97-98)

Respondent agrees with petitioner's statement that no eye witness was called at the trial and the only testimony came from a police officer who arrived at the scene approximately an hour and a half after the incident occurred (Pet. 3). Petitioner had the burden of proving that the uninsured motorist, Dorothy Lyssyj was negligent in order to recover from the respondent. The lower Court skillfully pointed out in the opinion that petitioner's answers to interrogatories disclosed that petitioner was aware of Mrs. Lyssyj's address in Houston. (Pet. App. "B", 15). Yet, though the petitioner had the burden of proof, she failed to call the only eye witness and party who was allegedly negligent to testify at the trial. (Pet. App. "B" 15).

Respondent's motions for directed verdict and judgment notwithstanding verdict were denied by the

district court and judgment was entered in favor of the petitioner on May 7, 1974. On May 13, 1974 respondent filed notice of appeal and the lower Court reversed the judgment and remanded the case to the District Court, with direction to sustain the motion for judgment n.o.v. and to dismiss the complaint. (Pet. App. "B" 16). The 8th Circuit Court correctly held that there was no substantial evidence to support the jury finding of negligence.

ARGUMENT

Petitioner contends that the court below did not apply the correct test of the sufficiency of the evidence as set forth in its own decisions and the decisions of this court.

Respondent respectfully submits that the petition for Writ of Certiorari filed by petitioner should not be granted on the basis that a reading of Rule 19 (Rules Supreme Court United States, Rule 19 Considerations governing review on certiorari) clearly reflects that a review on Writ of Certiorari will be granted only where there are special and important reasons therefor. Respondent contends that the question presented by the petitioner does not come within the purview of any of the reasons stated in Rule 19 for granting Writ of Certiorari.

The lower court's opinion accurately stated the issue on appeal, properly set forth by facts and law, and applied the law to the facts in the case. (Pet. App. "B").

Petitioner does not argue that the lower court was in error in citing cases relied on to reflect the current status of the law, but instead argues that the lower court failed to properly follow the test as set out in the opinions cited and relied upon. (Pet. 4)

It should be clearly pointed out that both parties argued the case on appeal on the basis that Arkansas Law Controls. (Pet. App. "B" 13).

Respondent takes issue with petitioner's statement that the court did not examine the test applied in *McKim v. Northwestern National Casualty Co.*, 256 Ark. 109, 505 S.W.2d 756 (1974) to see if the test was the same as the federal test nor did it make any attempt to distinguish the cases factually. (Pet. 4) One only has to read the opinion to see that the lower court did exactly this. The Court not only cited previous cases involving Arkansas law to support its finding, but also cited cases holding that the federal and state tests of sufficiency of the evidence are substantially the same. The Court went even further to cite the leading Supreme Court case on the issue, *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 444-45 (1959), and the current federal case of *Wetzel v. Eaton Corp.*, 62 F.R.D. 22, 25-26 (D.C. Minn. 1973), for a complete analysis of cases arising since the *Dick* case. (Pet. App. "B" 13). The lower court had no reason to attempt to distinguish the *Marshall v. Humble Oil & Refining Co.*, 459 F.2d 355 (8th Cir. 1972) and *McKim*, supra, cases factually. The *McKim* case was not the case on appeal. Both cases correctly state the sufficiency of the evidence test and were cited for this proposition. The petitioner states in her argument that Arkansas adheres to the evidentiary basis test (Pet. 5). The lower Court, after carefully comparing the evidence in the *McKim* case with that in the case at bar, stated in its concluding paragraph that, as in *McKim*, the evidence in the present case offered no more than a choice of possibilities and that there was no substantial evidence to establish Mrs. Lyssyj's negligence.

Respondent respectfully submits the lower Court reviewed the evidence in the light most favorable to the petitioner and did not search the record for gaps in petitioner's proof. (Pet. 5) The lower Court in viewing the evidence in the light most favorable to petitioner, searched the record for any substantial evidence of negligence on the part of the uninsured motorist, and concluded that a reasonable probability that Mrs. Lyssyj's negligence had caused the accident had not been established by substantial evidence. The Court noted that a jury verdict cannot be based solely upon conjecture or speculation. (Pet. App. "B" 16).

Petitioner argues that if a man crossing a road had almost reached the other side, it is reasonable to infer that he had crossed the driver's field of vision. (Pet. 6) The lower Court's opinion correctly states that there is no evidence as to decedent's movements just prior to the accident. We do not know the direction in which he was heading. If he came from the east and suddenly entered only three feet onto the highway, it is unlikely he could have been seen in time to avoid the accident. (Pet. App. "B" 15-16). In answer to petitioner's contention that there was ample room to avoid striking the pedestrian, the lower Court's opinion correctly states that there is no evidence whether there was traffic in the west lane which prevented the driver from seeing decedent, if he were moving in an easterly direction, or which might prevent her from avoiding the accident by turning to the left. (Pet. App. "B" 16).

There was absolutely *no* evidence, as to any act of negligence on the part of the uninsured motorist.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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